No. 93-559

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

COLORADO STATE BOARD OF AGRICULTURE
in its capacity as the governing board
of the Colorado State University,
Petitioner,

v.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents' brief in opposition to certiorari is striking primarily for what it does not dispute. Respondents do not deny that the two courts of appeals that have addressed the issue whether a Title IX plaintiff must prove intentional discrimination reached *directly contrary* conclusions. As respondents concede "[i]n *Cannon* v. *University of Chicago*, 648 F.2d 1104, *cert. denied*, 454 U.S. 1128 (1981), . . . the Seventh Circuit concluded that Title [IX] prohibit[s] only *intentional* discrimination." Opp. at 14 (emphasis added). The Tenth Circuit, by contrast "conclu[ded] that intent is *not* a necessary element of a Title IX athletics violation." *Id.* at 12 (emphasis added). Thus, the conflict in the Circuits could not be plainer.

Similarly, at least in the expansive context of budget-motivated cutbacks, respondents do not dispute that the approach adopted below sanctions—indeed mandates—*intentional* gender-motivated discrimination against male student-athletes in direct contravention of the plain language of Title IX. See 20 U.S.C. § 1681(a) ("[n]o person . . . shall, on the basis of sex, be excluded from participation in . . . any education program or activity"). Indeed, respondents embrace as "surely correct" a lower court decision expressly recognizing as much and relying on the decision below in dismissing *as a matter of law* the claims of male student-athletes who alleged that their team was singled out for termination on purely gender-motivated grounds. See Opp. at 25 n.33 (citing *Kelley* v. *Board of Trustees of the Univ. of Ill.*, No. 93-1327[, 1993 WL 334771, at *6] (C.D. Ill. Sept. 1, 1993) ("Plaintiffs are requesting gender equity, or gender equality, in sharing the loss [of athletic opportunities]. This seems a fair request but conflicts with the imperatives of Title IX")).

Nor do respondents dispute that this case is of immense practical importance to educational institutions across the nation. Indeed, respondents do not even address the enormous and troubling impact of the decision below on the ability of financially strapped educational institutions to make decisions that best accommodate their students' edu-

cational and extracurricular needs within fiscal constraints —matters addressed at length in the briefs *amici curiae* filed by the Alabama Association of School Boards and the Birmingham Public Schools ("Public Schools Brief"), the American Council on Education, *et al.* ("Higher Education Brief") and the States of Arizona, North Carolina and Pennsylvania and the Commonwealth of Puerto Rico ("States Brief").

Instead, respondents primarily argue that they should prevail on the merits because the Seventh Circuit "reached the wrong conclusion" on the Title IX intent question. Opp. at 14. In large measure, this argument is based on an aggressive reading of this Court's fractured opinions in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983). There, a bare majority of this Court held with respect to *Title VI* that a federal agency's "implementing" regulations legitimately may proscribe, as discriminatory, conduct which the statute itself does not prohibit.[1] Respondents assert that this "logic" should be extended to the Title IX context. But the validity of the Seventh Circuit's decision and the proper scope of *Guardians* are precisely the important, unresolved issues that educational institutions need to have clarified and which

[1] Justices Stevens, Brennan and Blackmun held that although "proof of invidious purpose is a necessary component of a valid Title VI claim," plaintiffs have "only . . . to show that the [defendant's] actions were producing discriminatory effects in order to prove a violation of valid federal law." *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 642-45 (1983). Justices White and Marshall, in separate opinions concluded that both Title VI itself and the implementing regulations prohibit actions which have a disparate impact. *See id.* at 591 (opinion of White, J.); *id.* at 623 and n.15 (opinion of Marshall, J.). Now-Chief Justice Rehnquist and Justice O'Connor, in separate opinions, concluded that intent is required to prove a violation of either the statute or the implementing regulations. *See id.* at 612 (opinion of Rehnquist, J.); *id.* at 612-13 (opinion of O'Connor, J.). Finally, Justice Powell, joined by the Chief Justice, held that there is no private right of action under Title VI, and even if there were, plaintiffs must prove invidious intent whether suing under the statute or the implementing regulations. *See id.* at 610-11 & n.5.

are squarely raised by petitioners. Indeed, respondents' eagerness to argue the merits of interpreting Title IX to require equal outcome, rather than equal opportunity, including their strained efforts to divine congressional policy from post-enactment congressional *in*action,[2] merely underscore the need for immediate review.

1. In the Seventh Circuit, a Title IX plaintiff must prove gender-motivation, *i.e.*, that "discriminatory considerations were involved in the defendant's actions." *Cannon* v. *University of Chicago*, 648 F.2d 1104, 1110 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981). In the decision below, by contrast, the Tenth Circuit held that "the district court did not err here in failing to require proof of discriminatory intent." Pet. App. C-18. The existence of a clear circuit split on the substantive Title IX discrimination standard is indisputable. Given the undisputed and undisputable financial crisis facing the nation's educational institutions, it is simply unacceptable that the scope of a school's Title IX obligations should depend solely upon the part of the country where it exists

Respondents argue, however, that two prior decisions of this Court, one involving another statute, *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983), and one that does not even address the substantive discrimination standard, *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992), tacitly "overruled" *Cannon*, thereby "resolving" the conflict. Contrary to the misleading impression created by the opposition, neither decision had any such effect.

In *Guardians*, this Court, as it subsequently explained, held that while "Title VI itself directly reached only instances of intentional discrimination . . . actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." *Alexander* v. *Choate*, 469 U.S. 287, 293 (1985). Respondents assume, without explanation, that the same must be true of Title IX. On

[2] *See, e.g., Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987) ("Congress' silence is just that—silence").

the contrary, even assuming the continuing validity of that questionable doctrine in the Title VI context, there is certainly no basis for *assuming* that it applies elsewhere. As this Court expressly recognized in *Alexander*, the only conceivable ground for the conclusion that "implementing" regulations may conflict with statutory language is a determination that *Congress* delegated this legislative power to the agency. The question is thus one of statute-specific legislative intent. And, the finding in *Guardians* that Congress intended to delegate to the Department of Labor, the Department of Justice, and the Department of Housing and Urban Development authority to expand the definition of illegal *race* discrimination prohibited by *Title VI* is therefore in no way relevant to the question whether Congress intended to delegate to the Department of Education authority to expand the definition of illegal *gender* discrimination under *Title IX*.

Moreover, even if this Court were to accept respondents' invitation to extend the *Guardians* approach to Title IX, both the plain language of Title IX, see 20 U.S.C. § 1681(b),[3] and the lack of any clear statement in the regulations, present formidable bars to any argument on the merits that Congress *did* in fact intend to delegate to the Department of Education authority to discard the stat-

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[3] [Nothing in Title IX] shall be interpreted to require any educational institution to grant preferential or disparate treatment to members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating . . . in comparison with the total number or percentage of persons of that sex in any community.

Having only pages earlier vigorously argued that Title VI sets the Title IX standard—and that *Guardians* is therefore dispositive—respondents next claim that the Court must look to Title VII to divine Congress' meaning. Then, recognizing that in order to prevail they need to rely on both Title VI and Title VII whenever convenient for the particular argument, they claim that "[i]t is not necessary to reach here the question whether Title IX is more like Title VI or Title VII." Opp. at 17 n.22. Respondents' confusion simply reflects the confusion that exists among the courts of appeals.

utory requirement that plaintiffs prove that the educational institution acted with improper gender-motivation. Respondents can (and do) argue that Title IX should be read as authorizing disparate impact regulations, but that is a decision that can only be made by this Court after full consideration of the issue. Unless, and until that happens—and petitioner urges the Court to address that difficult issue here—*Guardians* in no way resolves the conflict among the lower courts with regard to the substantive discrimination standard under Title IX.[4]

Nor is *Franklin* any aid in resolving that conflict. *Franklin* dealt only with the scope of remedies available to Title IX plaintiffs who have already proven unlawful intentional discrimination. See 112 S. Ct. at 1032 ("in this case we must decide what remedies are available in a suit brought pursuant to this implied right"). The issue of the appropriate substantive standard for determining *whether* unlawful discrimination has occurred was neither raised nor addressed in any way by the majority or the concurrence.[5]

Unable to dispute the existence of a circuit split on the necessity of showing gender motivation, respondents at-

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[4] Respondents imply that the court of appeals actually applied the *Guardians* rationale, finding a violation of the regulation and not the statute. On the contrary, the court expressly *rejected* the Title VI analogy and held that Title VII is "the most appropriate analogue when defining Title IX's substantive standards, including the question of whether 'disparate impact' is sufficient to establish discrimination under Title IX." Pet. App. C-18 (internal quotation omitted). The court then made clear its view that a plaintiff need not prove discriminatory intent to establish a violation of Title IX itself. *Id.* ("[b]ecause it is well settled that Title VII does not require proof of overt discrimination . . . the district court did not err here in failing to require proof of discriminatory intent").

[5] Because the *Franklin* Court did *not* decide whether Title IX's prohibitions extend beyond intentional discrimination, and because the Spending Clause, if applicable, may limit damages awards for unintentional violations, the Court necessarily limited its holding that damages are available to intentional discrimination of the sort at issue in that case. Respondents' strained attempt to interpret this as an implied holding that disparate impacts may violate Title IX is mere wishful thinking.

tempt to divert attention from that conflict by noting that the court of appeals left open the possibility that a purely statistics-based prima facie case of Title IX discrimination may be rebutted. That, of course, is entirely beside the point. True, a Tenth Circuit educational institution which, like CSU, acts with completely benign motivations may occasionally escape Title IX liability at trial by proving affirmatively that it has through economic boom and bust continually added womens' teams in an effort to reach statistical parity or that the interests and abilities of *all* potential female student-athletes have been fully satisfied. In the Seventh Circuit, however, an educational institution is entitled to judgment as a matter of law on a claim based upon statistics rather than evidence of improper motive. Only one of these approaches can be the correct one; the choice of approach is virtually always outcome-determinative;[6] and educational institutions have a right to know the regime under which they must operate.

That leaves only respondents' astonishing claim that there is no conflict because CSU *intentionally* discriminated against them. But neither the district court nor the court of appeals found any evidence of intentional discrimination. Moreover, respondents did not even offer any evidence to rebut the undisputed testimony that CSU's decision to terminate its baseball and softball programs—a decision that actually *benefitted* women, substantially

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[6] As the Higher Education Brief forcefully demonstrates, in practice, the Tenth Circuit standard requires no more than a showing of pure disparate impact. See Higher Education Brief at 4-5. The "continuing expansion" defense is available only to those institutions, if any, that can show that, from the mid-1970s to the present, they have continually and without pause worked to achieve statistical parity by adding female athletic participation slots, an especially rigorous standard given the reality of budget constraints and the fact that Title IX did not even apply to most athletic programs until March 22, 1988, when the Civil Rights Act of 1987 overruled this Court's conclusion in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), that Title IX's prohibitions were intended to be program-specific. And, in practice, the "full accommodation" defense is *never* available, because the presence of aggrieved members of the terminated team is *always* sufficient to demonstrate that *their* interests and abilities are not fully accommodated.

increasing their share of athletic participation opportunities and providing additional resources for other female teams—was budget-motivated and that CSU took affirmative steps to assure itself that gender played no role in the decision process.[7]

Nevertheless, respondents assert that CSU's sports teams are facially sex-segregated, and therefore intent is established as a matter of law. In the courts below, respondents never challenged the sex segregation of CSU's sports teams. Indeed, their goal from the outset has been reinstatement of a sex-segregated softball team. Respondents challenged only CSU's decision to terminate softball, and it is undisputed that that decision was in no way gender-motivated. This case presents an ideal vehicle for resolving the circuit split on the issue of what, if anything, other than intentional gender-motivated discrimination, constitutes a violation of Title IX.

2. Respondents also fail in their efforts to downplay the split between the First and Tenth Circuits on the secondary issue whether a federal court may ever require an educational institution to fund a particular team on the basis of a program-wide statistics-based violation of Title IX. If disparate impact Title IX liability is ultimately upheld, this issue is of enormous importance to educational institutions.

Respondents make much out of the fact that the case at bar is an individual action while the First Circuit case was a class action. Accordingly, respondents argue, the team-specific remedy ordered below was necessary to "redress" respondents' injury. Neither court relied on that

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[7] *See, e.g.*, Tr. at 93 ("Your Honor . . . plaintiffs will stipulate that . . . there were severe financial problems at CSU during the [relevant] time period"); *id.* at 100-02 ("Q. What considerations did you look at in softball in terms of possibly eliminating it? A. . . . In respect to both baseball and women's softball, one of the extraordinary aspects of the sport . . . is that travel expenses were extraordinary. . . . [Also] there was an awful lot of time spent by both baseball and women's softball of the athletes away from the classroom") (testimony of CSU President Albert C. Yates).

distinction, however, and, in any event, respondents fundamentally misconceive the nature of the rights at issue.

Respondents perceive the decision below as "vindicat[ing] their right to play softball." Opp. at 22. Whatever the resolution of the intentional nonintentional discrimination question, however, it is plain that Title IX embodies no right to force an educational institution to fund a softball team. See *Cohen* v. *Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993) ("Title IX does not require institutions to fund any particular number or type of athletic opportunities"). Title IX requires only that programs offered by educational institutions be free from gender discrimination. And when the claim is only that the "numbers" are "wrong," an educational institution obviously has a wide variety of options for getting the numbers "right" and thereby remedying the violation: the institution can add female participation slots in existing sports, add new female teams of whatever variety, cut existing male participation slots or entire teams, or even terminate its entire intercollegiate sports program. Thus, in this disparate impact context, individual plaintiffs and class action plaintiffs are on equal footing—neither was the victim of intentional discrimination, and neither is entitled to any specific relief. Because respondents prevailed only on program-wide statistical imbalance claims, any response by CSU that addresses the statistical imbalance complained of adequately redresses their injury, if not their nonexistent "right to play softball."[8] The conflict between the circuits on the proper remedy, and the fact that the remedy ordered below bears no relation to and does not remedy the statistical imbalance upon which liability was based, provide an independent ground for review of the decision below.

3. As noted above, respondents do not dispute that expanding the scope of Title IX liability to encompass disparate impact cases, as the court below did, will have

[8] By contrast, specifically ordering CSU to reinstate softball, as respondents concede, does *not* redress the claimed statistical violation. *See* Opp. at 24.

an enormous impact on educational institutions at all levels. The briefs *amici curiae* of the thousands of institutions actually dealing with the problem day-to-day—elementary, middle, and high schools, colleges and universities, conferences, associations, and States—amply demonstrate that the confusion surrounding the Title IX liability standard is a nationwide problem of exceptional importance.

In this regard, the Public Schools Brief provides a startling insight into the real world effects of the decision below. The Birmingham public school system is an inner city school system, which is so severely financially strapped that it recently was forced to fire all teachers' aides. In 1992, after a *six-year*, statistics-focused investigation, OCR found Birmingham's public schools in violation of Title IX. In response, the District agreed to conduct athletic interest surveys of its students.[9] Without exception, those surveys, which were *approved in advance by OCR*, showed that boys have a proportionately greater interest in participating in interscholastic sports than do girls. Indeed, interested boys outnumbered interested girls nearly two to one.

In light of the survey results and the plain language of Title IX, Birmingham proposed an equality of opportunity approach to Title IX compliance—*i.e.*, it proposed structuring sports offerings in light of budget constraints so that equal percentages of *interested* boys and *interested* girls could participate in interscholastic athletics. Thus, every interested student, regardless of gender, would have the same opportunity to participate. Explicitly relying on the decision below, OCR flatly rejected this approach in favor of strict *statistical* parity, regardless of relative interest. OCR concluded that one school, for example, must *fund* twelve new girls' teams, including a swim team, even

[9] Because elementary, middle and high school students interested in participating in interscholastic athletics programs are rarely "cut" from teams for lack of ability, for purposes of the survey, it was assumed that *all* students—male and female—have the ability to compete in any sport in which they express interest.

though the school has no swimming pool. See Public Schools Brief at 8-15.

What this one dramatic example makes clear is that confusion surrounding the decision below has already had a profound effect on the Title IX landscape, even at the kindergarten through twelfth grade level. The proper liability standard for Title IX is simply too important and affects too many educational institutions at too many levels to further postpone the inevitable day when these issues are resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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